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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 103

LOUIS J. GARIEPY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

WILLIAM E. LEAHY,
Bowen Building,
Washington 5, D. C.,
Attorney for Petitioner.

JAMES E. HAGGERTY,
HARRY COHEN,
HARRY M. NAYER,
Detroit, Michigan,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF FOR PETITIONER

In a Brief in Opposition before this Court in another case now pending on certiorari, the Government in effect has taken the position that a ground for reversal, or certainly a substantial question for review by this Court, exists where there has been systematic geographical exclusion in the selection of jurors, and where there was "something peculiar" about that portion of the population selected which "sharply distinguished" it from the total population. Thus, in

its *Brief in Opposition* in *Titus* v. *United States,* No. 175, October Term 1955, the Government has stated:

> "Petitioner has not demonstrated that there was something peculiar to the 239,386 people in Albany County which sharply distinguished them from the total population of the Northern District, and consequently resulted in his having other than an impartial trial." (P. 10, *Br. in Opp., Titus* v. *United States,* No. 175, O. T. 1955)[1]

If the standard suggested by the Government in that case is applied here—as reasonable consistency would appear to dictate—review by this Court seems plainly warranted.

Precisely the demonstration the Government claimed to be lacking in the *Titus* and *Klock* cases has been made here. In this case, the Petitioner clearly showed that the two counties in the district from which the members of the jury panel had been exclusively drawn were the counties in the district which had been most heavily saturated with pre-trial publicity adverse to him. And the Court below plainly conceded this:

> "The indictment and trial of appellant's brother, Dr. Bernard Gariepy, had received unusual publicity in newspapers published in Wayne and Oakland Counties, as well as from radio and television. After conviction of appellant's brother * * * the indictment of appellant for income tax evasion had been predicted by radio broadcast, as well as in newspapers published in Detroit. * * * Undoubtedly, appellant received bad press notices in Detroit * * *." (App. 9)

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[1] See also the Government's *Brief in Opposition,* p. 8, in *Klock* v. *United States,* No. 653, O.T. 1953, quoted in footnote 4 of our petition, page 12.

Apparently in order to overcome this clear demonstration "that there was something peculiar to the * * * people" in Oakland and Wayne Counties "which sharply distinguished them from the total population" of the district, the Government has shifted its ground of opposition in this case. It places reliance upon a so-called "exhaustive" *voir dire* examination as curing "the possibility of prejudice as a result of such publicity" (*Br. in Opp.*, p. 10).

But the excerpts from the *voir dire* examination set out in Appendix D to our Petition, indicate that the *voir dire* was hardly exhaustive. Repetition of one portion by way of illustration will suffice here:

> "(Original Juror No. 5 having been excused on peremptory challenge, the following was directed to the successor)
>
> "The Court: You did not read any article in the papers?
>
> "Juror No. 5: Well, I think I read one a long time ago, and when I came in today I remembered it, but that is such a long time ago I had almost forgotten it.
>
> "The Court: There may be some confusion in the names. You wouldn't be sure it was even the defendant in this case?
>
> "Juror No. 5: No, I wouldn't." (App. 25)

Even if the *voir dire* had been exhaustive, we do not believe that it could have purged from the case the prejudicial effects which the pre-trial publicity necessarily engendered. As the First Circuit has noted: "One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that

he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity." *Delaney* v. *United States,* 199 F. 2d 107, 112-113 (CA 1).[2]

As a reference to the newspaper clippings contained in the Supplemental Appendix for Appellant will alone make clear, few literate persons in the Detroit area (Wayne and Oakland Counties) during the years involved could have avoided acquiring some knowledge of or opinion about the troubles of either Dr. Bernard Gariepy or Petitioner, Dr. Louis J. Gariepy, or both.[3] And the excerpt from the interrogation of Juror No. 5 set out above illustrates that confusion between the brothers in the jurors' minds was a real and actual possibility.

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[2] The Government does not deny that there is a square conflict between the decision below and *Delaney* in the willingness of the appellate judges to rely "upon the therapeutic effect of *voir dire* examination to cure the detriment to Petitioner stemming from the adverse publicity," the conflict described in our Petition (p. 14). The difference in facts as to the *source* of the publicity which is the only difference pointed to by the Government (*Br. in Opp.*, p. 11), is no distinction whatever with respect to the prejudicial *effect* of the publicity, and cannot justify the conflict in decision on the proper judicial correction of that prejudice. Only this Court can spell out the extent to which *voir dire* examination alone can be relied upon in federal criminal trials to obviate any actual discriminatory effects from adverse publicity, which the Government in effect concedes might have "impaired petitioner's right to a fair trial" (*Br. in Opp.*, pp. 11-12), had it been more intensive; and which raises a general issue appropriate for resolution by this Court, as is made clear in our Petition (pp. 13-15).

[3] The newspaper clippings contained in the Supplemental Appendix for Appellant are, as they should be, limited to stories concerning Petitioner and do not reflect the publicity given to his brother's case. Examples of the type of newspaper publicity accorded Petitioner's brother are attached hereto.

The Government's statement on page 10 of its *Brief in Opposition* that "only one member of the jury had heard of petitioner or his brother prior to the day of trial, and that juror had no recollection of the circumstances and had formed no opinion" is misleading. The record indicates that seven of the jurors initially selected had read about this case in advance of trial (App. 23); Juror No. 4 knew about "the other doctor that was tried" (App. 24); Juror No. 6 admitted that he had read "something in the paper about some Dr. Gariepy" but did not know if it related to "this Dr. Gariepy or not" (App. 26); and other members of the jury panel likewise admitted having read or heard about one or the other of the Doctors Gariepy (see generally Appendix D). This, we submit, is more than adequate "foundation for the claim that the selection of jurors from the Detroit area impaired Petitioner's right to a fair trial." *Cf. Br. in Opp.*, pp. 10-11.

The Government also apparently seeks to extract some significance from the fact that the defendants waived two peremptory challenges, and Petitioner's counsel stated that he was satisfied with the jury as it existed just before the case went to trial. *Br. in Opp.*, p. 6.

But Petitioner's challenge to the array (13a-19a), vigorously made and argued (49a-60a), had already been denied (60a). All members of the jury panel were residents of the two counties most heavily saturated with adverse pre-trial publicity. The claim of prejudice was as strong against one as against any of the others. All the peremptory challenges and all the objections to the jury as constituted could not change the unalterable fact that the ultimate jury—so long as it was to be selected from the challenged panel—would

be composed of residents of Wayne and/or Oakland Counties.

It is rather extraordinary for the Government to suggest that defense counsel should have, in the presence of the prospective jury, again raised the challenge already overruled by the trial judge. To openly express dissatisfaction with the composition of the jury panel in its very presence would have been extremely naive, as any experienced trial lawyer knows. Petitioner's motion challenging the array had properly and timely established and protected his legal position on the question. The challenge to the array having been denied, it was incumbent upon Petitioner to proceed with the trial with the jury panel as it existed within the framework of the trial judge's ruling.

The Government's reply to Point I of our Petition raises more questions than it answers. Instead of justifying a denial of the requested writ of certiorari in this case, it bolsters and confirms the reasons set out in our Petition for this Court to consider the substantial questions presented.

* * * * *

The remaining points treated in the Government's Brief in Opposition in this case require no discussion beyond that contained in our Petition.

CONCLUSION

For the foregoing reasons and those contained in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM E. LEAHY,
Bowen Building,
Washington 5, D. C.,
Attorney for Petitioner.

JAMES E. HAGGERTY,
HARRY COHEN,
HARRY M. NAYER,
Detroit, Michigan,
Of Counsel.